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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1927.

NO. 68

CITY OF HAMMOND, LAKE COUNTY, INDIANA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF PETITIONER IN ADDITION TO THE BRIEF FILED IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI.

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To the Honorable the Justices of the Supreme Court of the United States:

The opinion delivered by the United States circuit court of appeals, seventh circuit, is reported in 11 F. (2d) 943, and is found on page 83 of the record filed in this court. The circuit court of appeals wrote no opinion except to refer to its decision in the case of *Schappi Bus Line, Incorporated* v.

City of Hammond, 11 F. (2d) 940, now pending in this court under No. 67. The latter case was decided on the same day (March 12, 1926), and in both of these cases the circuit court of appeals ordered the district court to enter a decree granting the injunction which had been refused in the district court. (R. 83.)

For a statement of the grounds on which jurisdiction is here invoked; a statement of the case; and the errors assigned, the petitioner respectfully refers to its brief filed herein in support of the petition for a writ of certiorari.

BRIEF OF ARGUMENT.

The law and facts which control the decision of this case are the same as in the case of *City of Hammond, petitioner, v. Schappi Bus Line, Incorporated, respondent*, No. 67 of this court. Therefore the petitioner in this case respectfully refers to and adopts, as its brief and argument in this case, the additional brief and argument filed in the *Schappi* case at this term by this petitioner.

This record presents the same error of fact that appears in the *Schappi* case, namely, a finding by the circuit court of appeals that respondent is a corporation of the state of Indiana. The record shows the contrary and that jurisdiction is invoked in the bill filed in the district court solely on the ground of diversity of citizenship. (R. 1.)

Petitioner respectfully submits that the decree of the circuit court of appeals in this case should be set aside, and the decree of the district court affirmed.

Respectfully submitted,

C. B. TINKHAM,
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Attorneys for Petitioner.

Supreme Court, U. S.
FILED
JUN 7 1926
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 12[redacted]386

CITY OF HAMMOND, LAKE COUNTY, INDIANA,
A MUNICIPAL CORPORATION,
Petitioner,

vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

No. 1229

CITY OF HAMMOND, LAKE COUNTY, INDIANA, A MUNICIPAL CORPORATION,

Petitioner,

vs.

FARINA BUS LINE AND TRANSPORTATION COMPANY, A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition for writ of certiorari should be denied because:

(a) The decision of the United States Circuit Court of Appeals is clearly within the scope of principles established by the decisions of this court.

(b) The decision is not in conflict with local laws.

(c) Ordinance 1945 is unconstitutional under the Fourteenth Amendment and the commerce clause of the Constitution of the United States.

(d) The ordinance illegally interferes with rights granted respondent by the State of Indiana.

STATEMENT OF FACTS.*

The opinion of the United States Circuit Court of Appeals was filed on March 12, 1926. It is not yet reported, but is set out on page 83 of the record.

This opinion does not set out a statement of the facts involved in this case. The statement made by petitioner, in its petition for a writ of certiorari filed in this court, entirely ignores many of the salient facts. This case is essentially a fact case. Respondent insists that ordinance 1945 of the City of Hammond attacked is unconstitutional; that it is in excess of the powers of the city, is invalid as a denial to respondent of due process of law and the equal protection of the laws, and is an unwarranted burden upon and discrimination against interstate commerce. To approach the problem of determining these questions, the court must have before it all the relevant facts and circumstances under which the ordinance questioned was enacted and is enforced. Respondent deems it essential, therefore, to set out fully the essential facts of this case.

Respondent is an Illinois corporation, engaged for four years before the commencement of this action in the operation of motor busses carrying passengers for hire interstate from certain towns in the State of Illinois into the City of Hammond, Indiana, and intrastate between the village of Munster, Indiana and Hammond, Indiana.

*NOTE: Petitioner in this case refers to and adopts, as his brief and argument in this case, a brief in support of the petition for writ of certiorari filed in the case of *City of Hammond* v. *Schappi Bus Lines, Inc.* For this reason, references are made in this brief to the brief filed with the petition in the *Schappi* case.

Throughout this statement and argument, where any quoted words or sentences are italicised, the italics are ours unless otherwise noted.

Respondent does not haul passengers between points within the City of Hammond but exclusively to and from points in the City of Hammond to and from the town of Munster in Indiana and the various towns served in the State of Illinois. (R. 15-16.) Respondent's operations are upon a definite regular schedule. (R. 17.) At the time of the commencement of this action, respondent brought, on an average, 600 passengers a day into Hammond, over 500 of which were interstate passengers from the Illinois towns. (R. 16.)

Respondent has complied with all the laws of both states relative to licenses for, and registration of, its motor busses and chauffeurs. (R. 16.) It has developed a profitable business with a substantial good will among the people who travel. Its lines supply the only transportation service between the Illinois towns and the City of Hammond, Indiana, and are a convenience and advantage to the people served in both towns. (R. 16.) An important part of its haul into Hammond is to accommodate residents of the Illinois towns coming to the down town district of Hammond to trade. (R. 2, 12.) It serves also many people traveling between Illinois and the Village of Munster and the southern part of Hammond. (R. 18-19.)

Respondent also operates in conjunction with Gary Street Railway Company. The Railway Company operates a line of street railway from Gary, Indiana, into Hammond. It also operates a line of busses into Hammond from points east and south. The depot or terminus for these operations is on Sibley street and is used in common by both companies. It is a general transfer point and many through passengers from Gary, by way of street cars and busses, are carried into the Illinois

towns by respondent's route by means of transfers. (R. 52.)

In its interstate operations, respondent is operating by virtue of its rights as defined by this court in *Buck* v. *Kuykendall*, 267 U. S. 307. In its intrastate operation in Indiana, respondent operates under a certificate of public convenience and necessity issued by Public Service Commission of Indiana, under Indiana Acts of 1925 c. 46, Sec. 2, p. 139, to respondent as a ninety day operator. (R. 16-17, 53.) (See p. 30, *supra*.)

The map, at page 44 of the printed record, shows, by the line drawn in pink, respondent's route and the location of the City of Hammond with adjacent cities in Indiana and Illinois. The Indiana-Illinois state line is the western boundary of the City of Hammond; its northern boundary is Lake Michigan; its southern boundary the Little Calumet River, and to the east and adjoining Hammond lie the cities of Whiting, East Chicago and Gary.

Hammond extends approximately nine miles north and south from the lake to the river; five miles east and west from the state line to the Gary limits in that portion of the city south of the Grand Calumet River, and from one and one-half miles to two miles east and west in that part of the city north of the Grand Calumet River. (R. 49, 51.)

The city has a population of 40,000 lying principally between the state line and Calumet avenue, a mile east thereof, and between Gostlin street on the north and Standard avenue on the south. There are, within the city limits, many streets in open, unoccupied territory and upon which there are no improvements at all, and many streets upon which there are few improvements. (R. 51-52.)

The town of Munster lies immediately south of Hammond and borders on the state line. Hohman street is the principal north and south street running through the residence and business districts of Hammond. It runs parallel to, and one block east of, the state line and continues south from Hammond through the town of Munster to an east and west highway, known as Ridge road, extending through Munster and westerly into the Illinois towns served by respondent. (R. 17, 49, 63.)

Hohman street is 80 feet in width, well paved. (R. 26, 23.) From the Little Calumet River north to Standard avenue, a distance of over a mile, it runs through open and sparsely settled country which is being built up as a residence district. North of Standard avenue it continues through the residence section of Hammond (R. 17-18) to the streets marked in pink on the map. (R. 49.) Hohman street is the direct route from the Illinois towns south of Hammond. (R. 21.) The only north and south streets from Ridge road into Hammond other than Hohman street are Calumet avenue, one mile, and Columbia avenue, one and one-half miles, east of Hohman street. (R. 17.) These streets are not reasonably usable by a carrier operating from Illinois into Hammond. (R. 17-18.) The down-town or business district of Hammond is principally on Hohman street north of Russell street and Sibley and State streets—the portion colored in purple on page 63 of the printed record.

There is a highway on the state line, but that is not improved as far south as Munster. (R. 21-23.) It is open from 21st Avenue north to the Michigan Central Railroad tracks in Hammond, but is not so that it can be used except north of Standard avenue, and

even over that part north of Standard avenue the pavement is not suitable for automobile traffic. (R. 21-23.)

On May 23, 1925, the ordinance here assailed was adopted. (R. 46-47.) This ordinance recites:

> "that in order to promote public safety and order and to diminish the congestion of vehicular travel within said city * * *"

By Section 1 it makes it unlawful to operate any motor vehicles over certain streets of the city. These streets are marked in purple on the map. (R. 63.) This section prevents operation into the business center of the city.

Section 2 of the ordinance makes it unlawful for any operator *to stop for the purpose of receiving or discharging passengers* upon *any* street, alley or other public place in the city,

> "provided that the Board of Public Works may, for any period not exceeding six (6) months or successions thereof, permit such operation on any or all of the following designated parts of streets; Columbia avenue between the south city limits and the right-of-way of the Michigan Central Railroad where the same crosses said Columbia avenue; Sibley street from Columbia avenue to the easterly line of the right-of-way of the Chicago, Indianapolis & Louisville Railway Company; State Line street from its southerly terminus to its northerly terminus at or near the right-of-way of said Michigan Central Railroad aforesaid; Rimbach avenue from State Line street to Ann street; Ann street from Rimbach avenue to Russell street; Russell street from Ann street to State Line street; and for vehicles engaged strictly in interstate commerce, any street or other public place north of 122nd street and east of Calumet avenue."

The streets to which the board of works may permit "such operation" under this proviso, are marked green on the map at page 63 of the record. No permit can

be granted for any part of Hohman street. (R. 17.) Even if granted such permits as the ordinance allows, respondent could not continue its route without great financial loss and inconvenience to the public traveling over its line. (R. 19.)

Section 3 of the ordinance imposes penalties for its violation, and provides that,

> "nothing in this Ordinance shall be construed to impair the obligation of any contract to which the City is a party, under which such motor vehicles are now operated for hire within said City."

Shortly prior to the adoption of this ordinance, the city had assumed to grant a franchise to one Miner, trustee. This franchise permitted operation of motor busses on every street in the city. Miner transferred his franchise to Calumet Motor Coach Company. That company operates the same type and size of bus as respondent. (R. 19.) Most of this operation was entirely within the city, but certain routes extended to East Chicago, Indiana and to the City of Chicago, Illinois. Ordinance 1945 has never been enforced against Calumet Motor Coach Company and it is permitted to run any of its busses upon all streets in the city and to stop anywhere to take on or discharge passengers. (R. 19.)

On May 25, 1925, two days after the ordinance was passed, respondent applied to the board of public works for a permit to operate over all the streets upon which the board might permit of operation under section 2. On June 12 the board arbitrarily declined to grant the request, but offered respondent, upon unacceptable conditions, a permit to stop to take on and let off passengers for a period of thirty days on the route shown by the green line on the left-hand side of the map at page 63 of the printed record. (R. 18.) Respondent

declined to accept the permit and asked for a permit, as described at page 52 of the record. If permitted so to operate, respondent would not be running on any streets marked in purple. (R. 63.) It would be unable to discharge and receive passengers on Hohman street but could do so after it left that street and could at least continue to carry on its through business exchange from the Gary lines and busses and to operate with the added efficiency, economy and convenience to the traveling public resulting from the connection of these lines at a common terminal transfer point. This requested permit, however, the board arbitrarily declined to issue. (R. 52.) Petitioner city proceeded to enforce the ordinance against respondent and to arrest respondent's drivers. To protect itself from these arrests, respondent commenced this suit.

ARGUMENT.

As the statement of facts shows, respondent, both in its interstate and intrastate commerce, was by Ordinance 1945 prevented from reaching its terminal or the down town district of petitioner city; it was prevented from stopping even momentarily to receive and discharge passengers upon any of the streets of the city except to a limited extent in the event that it could procure a permit from a board left with wholly abitrary powers. Even if a permit could be secured, the routes to which such permit could apply were distant and out of the way from any direct, convenient or feasible route between Hammond and the Illinois towns served by respondent.

Against the enforcement of the ordinance, respondent sought an injunction to protect its interstate and intrastate business. The right of respondent to engage in interstate business is furnished under the commerce clause of the Federal Constitution and respondent claims protection from arbitrary interference under the commerce clause of the Federal Constitution and under those sections of the Fourteenth Amendment preventing the deprivation of its property without due process of law and a denial of equal protection of the laws. Respondent's intrastate business was carried on under a ninety-day certificate of public convenience and necessity issued by Public Service Commission of Indiana in compliance with the proviso of Acts of Indiana, 1925, c. 46, sec. 2, p. 139. (See p. 31, *supra.*) Protection of this business is claimed upon the ground that petitioner exceeded its powers in interfering with opera-

tions under this certificate and upon the further ground that the ordinance was invalid as violating the provisions of the Fourteenth Amendment above referred to.

There is obviously nothing to petitioner's assertion that respondent relied upon the privilege and immunities clause of the Fourteenth Amendment. (Petn. 10.) Respondent invoked the protection of the due process clause and the equal protection of the laws clause of the amendment. (R. 4-6, 67-72.) The error of the Circuit Court of Appeals in stating in the *Schappi* decision that the Schappi Bus Lines, Inc., was an Indiana corporation was wholly immaterial to the result of the case. It is settled that these clauses apply to protect corporations and that a foreign corporation when lawfully carrying on business in a state is entitled to invoke against state discriminations the protection afforded by these clauses of the Fourteenth Amendment.

Southern Railway Co. v. *Greene*, 216 U. S. 400, 412-3.

Smyth v. *Ames*, 169 U. S. 466, 522.

Gulf, Colo. & Santa Fe Ry. Co. v. *Ellis*, 165 U. S. 150, 154.

The United States Circuit Court of Appeals held the ordinance invalid as to all operations of respondent and set out in its opinion the reasons that the ordinance could not be sustained as a police regulation.

This case does not involve the city's legal control of common carriers in the abstract. It is not a question as to what ordinances the city *might* have legally adopted, but whether the ordinance in question is within its powers. The ordinance upon its face purports to be an exercise of the police power to promote safety and to relieve congestion in the streets. It does not purport

to be a licensing act. In this state of the record, the Circuit Court of Appeals based its decision upon two grounds only, first, that the ordinance is discriminatory in that it does not apply to all motor bus carriers alike; and, second, that it is an unreasonable exercise of the police powers. The principles of law underlying the decision, namely, that police regulations must be reasonable and uniformly applied within the class, can scarcely be disputed. The case is largely one of fact, and the Circuit Court of Appeals very properly held, upon the record before it, that the city was in a police regulation discriminating in favor of the Calumet Motor Coach Company against all other motor carriers and was seeking to impose unreasonable restrictions and burdens upon the respondent as a carrier operating in and out of the city in purely interurban and interstate operation. This decision is clearly sustained by the applicable principles of law.

Petitioner, however, seeks a writ of certiorari to that court upon the theory that the ordinance was not a "police regulation" but was a proper exercise of the so-called "general police power to prevent the use of streets" "without an express grant" (Petn. 5, 15) and therefore the case was wrongly decided. Even if the ordinance of the city was enacted upon the basis now claimed by petitioner, still the result reached by the Circuit Court of Appeals should be the same.

Respondent's reply will show first that the decision of the Circuit Court of Appeals is clearly sustainable in that the ordinance attacked violates the commerce clause and the Fourteenth Amendment of the Federal Constitution. Thereafter respondent will point out briefly that the decision is not in conflict with the Indiana statutes or the Indiana decisions.

I.

THE CIRCUIT COURT OF APPEALS WAS CORRECT IN FINDING THAT ORDINANCE 1945 WAS NOT A CONSTITUTIONAL EXERCISE OF THE POLICE POWER OF PETITIONER.

Petitioner apparently concedes that if the ordinance is, as the ordinance itself states, an attempted police regulation, it is unconstitutional and the decision of the Circuit Court of Appeals is correct. Throughout the petition there is no claim that if the ordinance is a measure regulating legitimate users of the highway it can be sustained under the police power of the city to regulate. If the Circuit Court of Appeals was justified in treating this ordinance as an attempted police regulation, it is in effect conceded by petitioner that the case was correctly decided.

The Circuit Court of Appeals was justified in finding that ordinance 1945 was an attempted police regulation and that as such it was an illegal exercise of the police power and in excess of constitutional limitations. The ordinance is and was intended to be a discriminatory, regulatory measure. The ordinance itself recites that it is adopted "in order to promote public safety and order and to diminish congestion." The Circuit Court of Appeals, after a study of the briefs and after listening to oral argument, said in its opinion in the *Schappi* case:

> "we are of opinion that the ordinance cannot be sustained as a police regulation,—*and it is not claimed that it can be sustained upon any other theory.*" (Schappi Record, p. 101.)

Petitioner city cannot now be heard to assert that its ordinance was not an attempt at regulation in the exercise of guarding the public safety and convenience, but

was the exercise of some different power. This court will not take cognizance of this case to allow petitioner to advance a new and different claim disputing the recital of the ordinance itself.

The opinion that ordinance 1945 cannot be sustained as a constitutional exercise of the power of police regulation is clearly a correct one. It is adequately supported by the authorities.

A.

THE ORDINANCE IS AN UNREASONABLE REGULATION. IT DEPRIVES RESPONDENT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

We pass over petitioner's argument that respondent has no property right in the streets. (Schappi Petn. 25-27.) The decision in this case does not decide respondent has any such right. Nor does respondent claim such right. Respondent claims only protection against illegal and unconstitutional interference with, and arbitrary discrimination against, its lawful use of the highways in interstate commerce and in intrastate commerce.

The prohibitions of the ordinance are arbitrary and unreasonable and beyond the necessities of the case. The enforcement of them is unnecessarily destructive of the business of respondent, both as an interstate and intrastate carrier, and constitutes a taking of the property of respondent without due process of law.

Most of the prohibitions created have no tendency whatever to accomplish the prevention of any congestion or the promotion of any public convenience and safety. The prohibition against receiving or discharging passengers on any streets of the city (most of which streets are in resident, factory or sparsely settled territories),

except upon obtaining a permit that may be arbitrarily withheld; the limiting of streets upon which permits may be granted to streets which are unfit for motor bus traffic or which require two miles of roundabout, unnecessary travel; the denying of the right to stop momentarily to take on or discharge passengers at any point on Hohman street, even though most of a route over that street is over sparsely settled and residence territory and the street is 80 feet in width; the limiting to a single street in the extreme northeast of the city the right of purely interstate carriers to take on and discharge passengers; arbitrarily preventing respondent from reaching its common terminal,—these burdens of the ordinance are so obviously unrelated to any alleged protection of public safety and prevention of congestion that it is indisputable that the Circuit Court of Appeals was correct. The ordinance is but an arbitrary exclusion. The alleged regulation is wholly unreasonable. It is beyond the necessities of the case with which it recites that it treats.

The principle of reasonableness in police regulation is a principle of proportionateness. The courts have wisely recognized the principle that the legislative acts under the police power must have some fair and reasonable relation of means to end which the courts can see and admit the force of. The infringements of rights must bear a reasonable relation to the public necessity and to the end in view. Mere labels of "public safety", "public welfare" and the like cannot blind the court to the real relationship between the burden and limitation created and the end to be achieved.

Welch v. *Swasey*, 214 U. S. 91, 105.

C. B. & Q. Railway v. *Drainage Comm'rs*, 200 U. S. 561, 592-3.

Matter of Jacobs, 98 N. Y. 98, 110.
Ex Parte Whitwell, 98 Calif. 73, 78-9.
State v. *Ashbrook*, 154 Mo. 375, 385-6.

It has often been declared by this court that the test of a constitutional exercise of the police power is: whether the means employed have a real substantial relation to the end to be accomplished; whether the act is beyond the necessities of the case. This court has never hesitated to assert that if an enactment is palpably unreasonable, arbitrary and unnecessarily destructive of private rights, it will be declared invalid.

Welch v. *Swasey*, 214 U. S. 91, 105.
Lochner v. *New York*, 198 U. S. 45, 56.
Jacobson v. *Massachusetts*, 197 U. S. 11, 28.
Minnesota v. *Barber*, 136 U. S. 313, 320.
Mugler v. *Kansas*, 123 U. S. 623, 661.

Tested by any of these standards, this ordinance cannot be sustained.

B.

THE ORDINANCE IS INVALID AS A DIRECT AND UNWARRANTED BURDEN ON INTERSTATE COMMERCE.

The ordinance, even as an alleged police regulation, unduly and unnecessarily burdens and controls interstate commerce. It is a direct burden and limitation upon interstate commerce. It is, therefore, invalid.

In a situation which involves the exercise of the police power imposing restraints upon a carrier in interstate commerce, the court will scrutinize carefully the protection to be attained and the burden imposed. In such cases there is a conflict between the powers lodged by the Constitution in Congress and the rights of police

protection retained by the states. The question is whether the former has been improperly or unnecessarily invaded by the attempted exercise of the latter.

These principles are clearly expressed in *Railroad Co.* v. *Husen*, 95 U. S. 465, where the State of Missouri attempted under an alleged police regulation to control the transportation of cattle into and through the state. This court there said, pages 472-473:

> "Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. * * * it (a state) may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce. * * * They" (certain cases discussed) "deny validity to any State legislation professing to be an exercise of police power for protection against evils from abroad, which is beyond the necessity for its exercise wherever it interferes with the rights and powers of the Federal government."

And, after referring to decisions of certain state courts, this court continued, pages 473-4:

> "those courts have refused to inquire whether the prohibition did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power. That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of

the courts to guard vigilantly against any needless intrusion."

This rule is comprehensively stated in *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197. This court said, p. 201:

> "Through a long series of decisions dealing with the scope and effect of the commerce clause it has come to be well settled that a State, while possessing power to adopt reasonable measures to promote and protect the health, safety, morals and welfare of its people, even though interstate commerce be incidentally or indirectly affected, has no power to exclude from its limits foreign corporations or others engaged in interstate commerce, or by the imposition of conditions to *fetter their right to carry on such commerce, or to subject them in respect to their transactions therein to requirements which are unreasonable or pass beyond the bounds of suitable local protection.*"

The police power of the state cannot obstruct interstate commerce beyond the necessity of its exercise, and it is the duty of courts to see that, under color of it, objects not within its scope be not secured at the expense of federal guarantees. A state cannot control and regulate interstate commerce under "the convenient apologetics of the police power." This principle the United States Circuit Court of Appeals has wisely and properly applied.

Kansas Southern Ry. Co. v. *Kaw Valley Dist.* 233 U. S. 75.

Brennan v. Titusville, 153 U. S. 289, 299-302.

Voight v. *Wright*, 141 U. S. 62, 66.

Bowman v. *Chicago etc. Railway Company*, 125 U. S. 465, 488-493.

Henderson v. *Mayor of New York*, 92 U. S. 259, 271-2.

Chy Lung v. *Freeman*, 92 U. S. 275, 280.

Nor is the complaint that the Circuit Court of Appeals looked at the natural effect and result of the ordinance and not merely at the words of the ordinance, tenable. (Petn. 12.) Courts will always look to the real purpose and natural and practical effect of the operation of the statute. They will always consider the manner of enforcement. If that real purpose or that practical effect is to establish a restriction unnecessary or unrelated to the protection or undesigned to accomplish it, or if the practical effect is to infringe upon the federal powers, the act cannot be sustained.

In *Mugler* v. *Kansas*, 123 U. S. 623 this court said, p. 661:

> "The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty—indeed are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Yick Wo v. *Hopkins*, 118 U. S. 356, 373-4.
Minnesota v. *Barber*, 136 U. S. 313, 326.
Brimmer v. *Rebman*, 138 U. S. 78, 83.
Henderson v. *Mayor of New York*, 92 U. S. 259, 268, *supra*.

C.

THE ORDINANCE IS FLAGRANTLY DISCRIMINATORY. IT DENIES RESPONDENT EQUAL PROTECTION OF THE LAWS.

The attempted classification under the ordinance is arbitrary and renders it invalid as denying to respondent equal protection of the laws.

The attempt to make, for the regulatory purposes of promoting safety, public welfare and convenience, a classification between carriers franchised by the city, on the one hand, and carriers franchised by the state and operating interstate under the rights created by the commerce clause of the United States Constitution, on the other hand, is wholly arbitrary and an unjustifiable basis of classification. The carrier who secures a franchise from the city may carry on his interstate commerce into the city without restriction or limitations. A second interstate carrier doing a like business is restricted or prohibited.

Recognized differences and distinctions in fact and in relation to the purpose of the act alone furnish a basis for proper classification. Thus, for many purposes of police regulation, common carriers for hire may be grouped as a class and regulated differently than other users of the public highway. But the separating, in regulations to promote public safety and order of lawful operators of motor busses for hire, upon the basis that some obtain their right from the municipality and some from the state and others from the Federal Government—and the imposing of police restrictions upon the last group or the last two groups only is not proper classification to protect public safety and diminish congestion.

Classification to be supported must be based upon

some real difference *with reference to the purposes of the act.*

Atchison, Topeka & Santa Fe Ry. v. *Vosburg,* 238 U. S. 56, 59.

Southern Railway Co. v. *Greene,* 216 U. S. 400, 417.

Giozza v. *Tiernan,* 148 U. S. 657, 662.

Minneapolis Railway Company v. *Beckwith,* 129 U. S. 26, 28-31.

Bullock v. *Robinson,* 176 Ind. 198, 204.

School City of Rushville v. *Hayes,* 162 Ind. 193, 200, 202-4.

Where attempted classification is unnatural and arbitrary, it is invalid.

Gulf, etc., Ry. v. *Ellis,* 165 U. S. 150, 155-6.

Nicol v. *Ames,* 173 U. S. 509, 521.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540, 563-4.

Yick Wo v. *Hopkins,* 118 U. S. 356.

Harrigan & Reid Co. v. *Burton,* 224 Mich. 564, 569.

Bessette v. *The People,* 193 Ill. 334, 347-8.

The Calumet Motor Coach Company, whether in its local, interurban or interstate business, is permitted to run and stop upon all the streets in the city. It contributes more to congestion than all other bus operators. Respondent, in its motor bus operations, is excluded from the down town districts and restricted in its operation elsewhere. This is an unjustifiable discrimination.

If, in the public convenience and safety, it is necessary that busses be prevented from stopping to take on or discharge passengers, then the Calumet Motor Coach

Company cannot be permitted so to do. Applying these alleged safety regulations against respondent and not against another person engaged in the same business is an unjustifiable discrimination. Classification between respondent and Calumet Motor Coach Company and the treating of the two bus operators differently bears no relation to protecting public safety and convenience. Distinguishing the manner in which the one may use the streets and may be upon the highways and the manner in which the other may use the streets and be upon the highways is wholly arbitrary. The burden cast upon respondent is not cast upon another who must be in a similar class as far as restrictions for the protection of safety and public welfare are concerned.

The ruling of the Circuit Court of Appeals that ordinance 1945 was enacted in violation of the constitutional guarantees was in accord with the principles repeatedly enunciated in the decisions of this court. It furnishes no basis for the granting of the petition for writ of certiorari.

II.

THE ORDINANCE IS INVALID AS AN ATTEMPT BY PETITIONER TO CONTROL INTERSTATE COMMERCE AND TO DETERMINE WHO MAY ENGAGE THEREIN. IT IS A DIRECT AND UNWARRANTED BURDEN ON INTERSTATE COMMERCE.

Even assuming petitioner's present interpretation of its ordinance,—that the ordinance is an exercise of a so-called general police power to prohibit using the highways without obtaining a franchise from the city—still the ordinance is invalid. So interpreted, it constitutes an attempt by petitioner to determine who may engage

in interstate commerce and invades the province of control reserved entirely to the Federal Government.

One reason advanced by petitioner for urging the granting of this petition is that the opinion of the Circuit Court of Appeals did not discuss the question whether ordinance 1945 was invalid as an unwarranted interference with interstate commerce. This question was fully presented to the Circuit Court of Appeals in the briefs there filed, and in oral argument. Petitioner seems to have the idea that, even though the case were properly decided, this court will review the decision because the Circuit Court of Appeals did not discuss the interstate commerce feature of the case.

Petitioner now strenuously insists that the ordinance was not passed for the purpose which it recites but is sustainable as "an exercise of the general police power to prevent the use of the streets" by "a common carrier without an express grant or franchise" by the city. (Petn. 5, 15.) The argument is that no motor vehicle common carrier has any right to use the streets or highways of Hammond without the consent and authority of the city. Petitioner admits the arbitrary discrimination but contends that the "general police power" extends to prevent the use of the streets by a motor vehicle common carrier without express franchise from the city. This premise projects from every contention that petitioner makes. It is equally prominent in the ordinance itself,—on the face and in the manner of enforcement. The effect of this ordinance is at once apparent. The Calumet Motor Coach Company, holding a franchise, or any carrier who can obtain a franchise, from the city may engage in interstate business into Hammond in a manner different from and without restrictions placed upon other interstate carriers. It asserts the power of

the city to determine what persons shall haul interstate. It asserts the power of the city to make the rights of one interstate carrier greater than those of another. In the first statement of the case, after referring to respondent's operations, it is stated (Petn. 2):

> "While respondent was so operating, *without right* and without hindrance,"

And under the second of "Reasons for the Issuance of the Writ" it is asserted (Petn. 4) that the ordinance was not a police regulation but was

> "an exercise of the general police power to prevent the use of streets for the conduct of the private business of a common carrier without an express grant or franchise."

And, on page 10, petitioner insists that the Circuit Court erred by not sustaining the claim that petitioner had power

> "to *prevent the use* of its streets for the private business of *hauling* passengers as a common carrier by motor vehicle."

On page 15 it is again asserted that the Circuit Court was in error by not recognizing the power of petitioner

> "to determine in the first instance, what, if any, carrier, should be permitted to use the streets."

And in the brief attached to the petition for writ of certiorari in the case of *City of Hammond* v. *Schappi Bus Lines, Inc.* (incorporated by reference as a part of the brief in this case) petitioner devotes several pages to elaborating this claim (Schappi Petn. 23-25) and in conclusion asserts that the ordinance

> *"does not seek to regulate those having rights to do business in the street"* but ends *"unauthorized operation."* (Italics are petitioner's.)

It follows, petitioner insists, that respondent, if allowed to operate, may be subjected to any terms which

petitioner wishes to make; and respondent cannot object that they are discriminatory and arbitrary.

Petitioner's position is apparently taken upon the strength of language in the case of *Packard* v. *Banton*, 264 U. S. 140, 145. It is apparently because of this case that petitioner has denied that the ordinance is, as asserted in the ordinance itself, a police regulation. But the *Packard* case has been misunderstood by counsel. That case presented no question of the attempt by the state or its agency to exclude or discriminate against or put an unwarranted burden upon an interstate carrier or to make arbitrary discriminations between various interstate carriers. Yet all these things are the things which petitioner claims it has the power to do. Furthermore, the *Packard* case recognized that, in regulating, the Fourteenth Amendment prevented arbitrary discrimination within the class. (p. 144.)

Petitioner's attitude of mind has distorted its entire conception of the force of the provision of the Federal Constitution giving to Congress alone the power to control and regulate interstate commerce. The fallacy of petitioner's position has been but recently re-exposed by this court.

Buck v. *Kuykendall*, 267 U. S. 307.
Bush v. *Maloy*, 267 U. S. 317.

The very argument which petitioner makes was urged upon this court in the argument of the *Buck* case. Mr. Justice Brandeis thus states it, page 314:

> "In support of the decree dismissing the bill this argument is made: The right to travel interstate by auto vehicle upon the public highways may be a privilege or immunity of citizens of the United States. Compare *Crandall* v. *Nevada*, 6 Wall. 35. A citizen may have under the Fourteenth Amendment, the right to travel and transport his property upon them by auto vehicle. But he has no

right to make the highways his place of business by using them as a common carrier for hire. Such use is a privilege which may be granted or withheld by the State in its discretion * * *."

Mr. Justice Brandeis then says, page 315:

"The argument is not sound."

He then continues:

"It may be assumed * * * that appropriate state regulations adopted *primarily* to promote safety upon the highways and conservation in their use are not obnoxious to the Commerce Clause, where the indirect burden imposed upon interstate commerce is not unreasonable. * * * The provision here in question is of a different character. Its primary purpose is not regulation with a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. Moreover, it determines whether the prohibition shall be applied by resort, through state officials, to a test which is peculiarly within the province of federal action—the existence of adequate facilities for conducting interstate commerce."

Petitioner seeks to cast aside the decisions of this court by contending that it is not prohibiting running over its streets, but starting and stopping to take on or let off passengers. (Petn. 12; Schappi Petn. 35-40.) This prohibition, it says, is not a prohibition of anything the interstate carrier has a right to do. The prohibition is one that may be made in any discriminatory and arbitrary manner. It will be noted that the prohibition is not one of parking restrictions or parking prohibitions. It is a contention that momentary stopping upon the streets is not an incident of the right to travel over the streets,—is so wholly foreign and unrelated to interstate commerce as to be wholly outside the control of the

Federal Government in its regulation and control of that commerce.

This contention is palpably unsound. It is based upon a twist of mind seeking to catch at some device to control, indirectly, the thing which cannot be controlled directly. It is unsupported by authority.

That stopping in a reasonable manner and for a reasonable time to load and unload passengers being carried over the public highways is an essential and necessary part of transportation over the highways, and an inseparable incident thereto, is fully established by uniform authorities.

In the early English case of *Rex* v. *Cross*, 3 Camp. 224, the court, after considering its prior holding in *Rex* v. *Russell*, 6 East, 427, said, p. 227:

> "Every unauthorized obstruction of a highway to the annoyance of the King's subjects, is a nuisance. The King's highway is not to be used as a stable-yard. * * * A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time, and private premises must be provided for the coach to stand while waiting between one journey and the commencement of another."

In 2 Elliott on Roads and Streets, 3rd Ed., Par. 1100, the author says:

> "Travelers, whether on foot or in carriages have a right to stop a reasonable time by the roadside for their own convenience, provided they do not unduly interfere with the rights of others. *Thus, hacks and omnibuses may stop to load and unload passengers.*"

See also:

Callanan v. *Gilman*, 107 N. Y. 360, 365.

Smethhurst v. *Proprietors of Independence Congregational Church*, 148 Mass. 261, 266.

13 Ruling Case Law "Highways", Sec. 186, pp. 220-1.

Parker v. *Silverton*, 109 Ore. 298, involved an attempt by a city to prohibit a motor carrier doing an intrastate business under a certificate from the state from taking on or letting off passengers on any streets in the city except upon payment of a prohibitive tax. The Supreme Court of Washington held that this regulation could not be enforced. It said, 304-5:

> "To receive and discharge passengers upon the public streets of the city is an essential and necessary part of the transportation by automobile busses of passengers from one place to another, and when this is being done in the usual and customary way, under a permit regularly issued by the Public Service Commission, it is not within the power of the municipality to prevent or prohibit it."

Certainly under the decisions of the United States Supreme Court an interstate carrier has at least as great a protection against municipal interference as a carrier operating under a certificate from the state.

What the petitioner is really trying to do by this ordinance is to nullify the decision of this court in the *Buck* case and to determine itself what carriers may engage in interstate commerce within the city limits of Hammond. Petitioner's argument is:

The United States Supreme Court has said we cannot stop the actual passage of an interstate carrier for hire into or through the city. But we can cast any other burden on such a carrier. We can burden and discriminate against him. We can stop the passage of an interstate carrier if we go about it in an indirect manner.

This court will, of course, recognize the untenability of this position. This court, following in the *Buck* decision the principles of its prior decisions, was not merely saying that the state must find a different excuse for controlling who should operate in interstate com-

merce. This court was saying that the state could not dictate who should be an interstate carrier and could not burden nor obstruct interstate carriers. The vice is in the dictating, or the burdening or the obstructing. That this is attempted to be accomplished in some different form or disguise than the exact form which the plan took in the State of Washington, cannot render inapplicable the principles laid down by this court.

Certainly if, after the *Buck* decision, the State of Washington had passed an act saying that no carrier could stop on any highways of the state to receive or discharge a passenger unless it obtained a certificate of public convenience and necessity from the state, that act would have been unconstitutional.

The Hammond ordinance imposes both a direct and an unreasonable burden on an interstate carrier. Its primary purpose is not regulation, but the prohibition of every motor bus carrier not authorized to operate by the city. Under this ordinance city officials are to determine whether an interstate carrier is to be affected by the proposed limitation. It requires an interstate carrier to obtain either a franchise or a permit from the city before he can in fact carry on his interstate operations.

This is not a case wherein the court has determined that interstate carriers by motor bus are not subject to reasonable, nondiscriminatory police regulation. That power in the state, and in the city if delegated the power by the state, so long as the regulation does not unduly interfere with and burden interstate commerce, is undisputed. If we accept petitioner's present explanation of the basis of the alleged power to enact the ordinance, *i. e.*, that it ends "unauthorized operation", it is an attempt to cut across the *Buck* and *Bush* decisions of this

court. It is an endeavor to evade the principles enunciated by this court in *Railroad Co.* v. *Husen,* 95 U. S. 465. (See p. 16 of this brief.) It is an endeavor by the city to determine, *inter alia,* who, if anyone, may do interstate business between Illinois and the City of Hammond. In effect, it makes resort to municipal officials the test of the right to carry on interstate commerce. It is an attempt by a municipality to accomplish by means of a frail disguise the thing which this court has determined cannot be done by the state.

The Circuit Court of Appeals in refusing to adopt petitioner's contention was merely guided by the clear illumination of the decisions of this court. Petitioner is asking this court to review this case in order to redetermine the principle of its own recent decisions.

III.

ORDINANCE 1945 IS INVALID AS AN UNWARRANTED INTERFERENCE WITH RIGHTS GRANTED RESPONDENT AS AN INTRASTATE CARRIER UNDER A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED BY THE STATE OF INDIANA.

Respondent is authorized to carry on its intrastate operation, upon the route over which it has operated for four years, under a certificate of public convenience and necessity issued by Public Service Commission of Indiana. The Circuit Court of Appeals recognized the force and validity of this certificate and that the City of Hammond could not interfere with the rights granted under this certificate. This is clearly the law. Petitioner sought not only to discriminate against the certificate holder but to deny the certificate holder the right to operate at all over a portion of the route covered by the certificate and to deny the certificate holder the right to stop to

receive or discharge passengers over the remainder of that route within the City of Hammond. These acts were an attempt by the city to nullify and destroy the certificate granted by the state itself and to dictate where and how the certificate holder could operate. This the city cannot do. The certificate of the State Commission is paramount. It cannot be destroyed by purporting to enact local regulations.

City of Nelsonville v. *Ramsey*, 148 N. E. 694 (decided by the Supreme Court of Ohio, June 9, 1925).

Parker v. *Silverton*, 109 Ore. 298.

To avoid the force of these decisions, petitioner insists that the certificate issued by Public Service Commission is invalid. It contends, first, that respondent, being an Illinois corporation, could not be granted a certificate in Indiana. To maintain the contention that respondent, not being a corporation organized in Indiana, could not operate intrastate as a common carrier in Indiana, petitioner relies upon Acts of Indiana, 1913, c. 76, sec. 99, p. 201:

> "No license, permit or franchise to own, operate, manage or control any plant or equipment of any public utility shall be hereafter granted or transferred except to a corporation duly organized under the laws of the State of Indiana or to a citizen of such state."

In relying upon this statute, petitioner loses sight of the fact that, if it may be applied to motor bus regulation at all, its application therein is limited. Control of motor bus operation was first attempted by the State of Indiana in the Acts of 1925 (Acts of Indiana 1925, c. 46, p. 138). This act is set out in full in the appendix to the petition.

Section 1 of that act declares motor busses transporting persons for hire to be public utilities and governed by the Public Utility Act,

> "in so far as the terms and provisions of said act may be reasonably applicable to such carriers."

Section 2 makes it necessary to obtain a certificate of public convenience and necessity from the Public Service Commission of the state and then provides:

> "That the owner of any motor vehicle common carrier service which has been lawfully operated over a fixed route with a substantially regular schedule, upon the highways of the state for a period of ninety days immediately prior to the taking effect of this act and is engaged in such operation at the time of filing application therefor, shall receive from the public service commission a certificate of convenience and necessity to continue such operation,—"

upon filing an affidavit and complying with formal requisites.

It is not necessary here to determine whether section 99 of chapter 76 of Acts of Indiana, 1913, is applicable to any motor bus common carrier. Certainly it would be a forced construction in the light of the limitations in the application of the 1913 Act to motor busses as fixed in section 1 of the 1925 Act, to read section 99 as a limitation upon the proviso of section 2 above quoted. This would deny to nonresident individuals as well as foreign corporations the right to continue their established business lawfully commenced. Whether such a construction would leave the act constitutional need not be decided. The clear intendment of the legislature was to protect *all* bona fide operators on authorized routes. It did not intend that this protection should be nullified by the 1913 Act.

Acts of Indiana, 1925, c. 46, sec. 5, p. 140, provide:

> "and *Provided, further,* That in any city or town of this state where motor transportation is now furnished under, or by color of, a contract, and in cities and towns contiguous thereto, the board of public works, common council or board of trustees, as the case may be, shall continue to supervise, control, permit, contract for and regulate such service and to determine when, if at all, for public convenience and necessity competing service shall be established; * * *."

Petitioner next contends that, under this provision, Public Service Commission had no control over any motor bus service into the City of Hammond. The Supreme Court of Indiana has never passed upon the constitutionality or construction of section 5. The proviso is, however, clearly unconstitutional. It is invalid as creating an arbitrary and unreasonable classification having no just relation to the act in respect to which the classification is made.

Although cities may be identical in size and traffic problems, the control of local motor transportation in such cities as between the city council and the State Commission is determined by the circumstance, first, of the execution of a contract for such transportation service, and, second, that the city is contiguous to a city which has made such contract. This classification is made solely on whether color of contract has been made, or on the incident of geography. There is no distinction between cities coming under the proviso and those outside, based upon a natural or reasonable difference in transportation problems which the law seeks to regulate.

See cases cited in this argument, page 20, *ante.*

Even if the proviso in section 5 is valid, it does not

take away the right of respondent as a ninety-day operator to be granted a certificate from the state as a matter of right. It was not intended that the proviso of section 5 should nullify the proviso of section 2 and should make a discrimination between established operators. (See p. 31, *ante.*)

Furthermore, no reasonable construction of section 5 can extend that section to give the city control over interurban carriers who are not doing a local business within the city. The city cannot control interurban business within the state. Respondent in this case was doing no local business within petitioner city. It service was in no wise competitive with service rendered by Calumet Motor Coach Company under an alleged contract. The route of respondent was, therefore, one over which, under any interpretation, Public Service Commission had jurisdiction. That Commission, having issued a certificate, this certificate cannot be annulled by the city.

We have dealt briefly with the question of the invalidity of ordinance 1945 under the state laws, because the ordinance is so clearly in violation of federal law that it is unnecessary to unduly extend this brief by further analyzing the various provisions of the state laws regulating public utilities and motor busses.

IV.

THE DECISION IN THIS CASE IS NOT IN CONFLICT WITH LOCAL LAW.

The Indiana decisions referred to by petitioner do not bear out petitioner's contention that there is a conflict between the decision of this case and decisions of the Supreme Court of Indiana.

Farmers etc. Tel. Co. v. *Boswell Tel. Co.*, 187 Ind. 371,

discussed only the rights of competing local utilities as fixed by the 1913 Act. It did not determine the question of the power granted to Public Service Commission to issue certificates to interurban motor bus operators under the Act of 1925. Furthermore, this case presented no question of an attempted police regulation and had no bearing upon the question of an ordinance of police regulation. No decisions in Indiana sustain an ordinance which is a police regulation and distinguishes between members of the same class.

The cases of *Denny* v. *City of Muncie,* 149 N. E. 639 (decided by the Supreme Court of Indiana, Nov. 24, 1925), and *Frick* v. *City of Gary,* 192 Ind. 76, were cases upholding police regulations operating uniformly within the class. Both were decided upon ordinances adopted prior to the Acts of Indiana, 1925, regulating motor vehicle common carriers. In neither case was there any arbitrary and unwarranted classification. In neither was the burden unrelated to the public protection to be safeguarded. In neither was there any attempt to discriminate within a proper classification. In neither was there an endeavor to hamper and unduly burden carriers authorized to operate under state acts or in interstate commerce and to relieve from such burdens carriers who could obtain a consent from the municipality.

It is respectfully submitted, therefore, that petitioner has not shown error in the decision of the United States Circuit Court of Appeals. Petitioner has not made out a case warranting this court in granting the petition for a writ of certiorari, and this petition should be dismissed.

Respectfully submitted,

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